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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. ~~73~~ - 2051

UNITED STATES OF AMERICA ex rel JOSEPH BOMBACINO,

Petitioner,

vs.

PETER BENSINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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IN THE

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No. ——

UNITED STATES OF AMERICA ex rel JOSEPH BOMBACINO,

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vs.

PETER BENSINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 19, 1974.

OPINION BELOW

The opinion below has not yet been published but is reprinted herein as Appendix A infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A infra) was entered on June 19, 1974. Petitioner's motion to stay the mandate of the Court of Appeals pending final disposition of this petition was denied by that court. This petition is filed within 30 days of the final order of the United States Court of Appeals. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

HISTORY OF THE CASE

Your petitioner was originally charged with the offense of Murder and was convicted of the offense of Voluntary Manslaughter in the Circuit Court of Cook County, Chicago, Illinois. His conviction was affirmed in the Illinois Supreme Court. *People* v. *Bombacino,* 51 Ill. 2d 17, 280 N.E. 2d 697 (January 14, 1972). A Petition for Certiorari was denied by this court. *Bombacino* v. *Illinois,* 409 U.S. 912. Subsequent to the petitioner's surrender into custody to the Illinois Department of Corrections, a Writ of Habeas Corpus was filed in the United States District Court for the Northern District of Illinois. The Honorable Judge Julius Hoffman of that court issued the Writ of Habeas Corpus and ordered the petitioner's release from custody. The State of Illinois appealed that decision to the Seventh Circuit Court of Appeals and on June 19, 1974, that court reversed the judgment of Judge Hoffman.

QUESTION PRESENTED

Does the decision of this court in *Kent* v. *United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed. 2d 84, and the due process clause of the Fourteenth Amendment to the United States Constitution require that a State juvenile court provide a hearing, take testimony, allow for confrontation of witnesses, and give specific reasons for a decision before that court dismisses a delinquency petition against a 16 year old boy, waives its jurisdiction over that boy and therefore permits the State to prosecute him as an adult?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> ". . . Nor shall any State deprive any person of his life, liberty, or property, without due process of law; . . ."

STATUTES INVOLVED

Illinois Revised Statutes, Chapter 37, Sec. 702-7(1) reads in pertinent part:

> "Except as provided in this section, no boy who is under 17 years of age . . . at the time of the alleged offense may be prosecuted under the criminal laws of this state or for violation of any ordinance of any political subdivision thereof."

Illinois Revised Statutes, Chapter 37, Sec. 702-7(3) reads as follows.

> "If a petition alleges commission by a minor 13 years of age or older of an act which constitutes a a crime under laws of the state, the State's Attorney

shall determine the court in which the minor is to be prosecuted; however, if the Juvenile Court Judge objects to the removal of the case from the jurisdiction of the Juvenile Court, the matter shall be referred to the Chief Judge of the Circuit for decision and disposition."

STATEMENT

On April 25, 1969 your petitioner was arrested for the offense of aggravated battery in that he was alleged to have participated in the beating of one William Edyburn. A delinquency petition was filed against him, as he was 16 years old on that date. Subsequently, William Edyburn died and on May 6, 1969 the State's Attorney of Cook County, Chicago, Illinois filed a new delinquency petition charging your petitioner with participating in the death of Edyburn. The State, pursuant to Ch. 37, Illinois Rev. Stat. Sec. 702(3), filed a motion to remove the cause from the juvenile court to the adult court for prosecution. On May 13, 1969 without a hearing and without any reasons given for its ruling, the juvenile court stated:

> "Based on that section (referring to Ch. 37, Sec. 702-7(3)), I believe the State has a right to proceed in the manner that they indicated and requesting this court to waive its jurisdiction over the juvenile. The order will be in each of the four petitions (There was another juvenile involved who was subsequently acquitted): Criminal proceedings instituted, juvenile petitions will be dismissed and these cases will be closed as to the juvenile court. That is the order"

Prior to the court's ruling the petitioner had objected to the petition of removal. Petitioner was subsequently indicted for the offense of murder in the Circuit Court of

Cook County. A motion to dismiss the indictment for failure of the juvenile court to conduct a hearing and to state reasons for the transfer was denied. The petitioner was tried by a jury which returned a verdict of guilty of voluntary manslaughter and the petitioner was sentenced to the Illinois Department of Corrections for a term of not less than one nor more than five years.

After the affirmance of his conviction in the Illinois Supreme Court the petitioner surrendered to the Illinois Department of Corrections to start serving his sentence pursuant to a Writ of Habeas Corpus filed in the United States District Court for the Northern District of Illinois, the Honorable Judge Julius Hoffman of that court issued the Writ and ordered the petitioner released from custody on the grounds that the failure of the Juvenile Court to conduct a hearing denied the petitioner due process of law as guaranteed by the United States Constitution. On an appeal taken by the Department of Corrections, the Seventh Circuit Court of Illinois reversed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS WHEN THE JUVENILE COURT IMPROPERLY WAIVED ITS JURISDICTION OVER THE PETITIONER.

This Court in *Kent* v. *United States,* 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 held, in interpreting a juvenile court statute for the District of Columbia that fairness and due process were required prior to the juvenile court waiving its jurisdiction over a minor charged with a criminal offense. Certain rights were set forth in the opinion:

> "The juvenile was entitled to a hearing, including access by his counsel to the social records and probation records . . . and to a statement of reasons for the juvenile court's decision."

For a period of time there was a question as to whether the opinion in *Kent* was merely an interpretation of a statute or had constitutional dimensions. The question was resolved by this Court in the case of *In re Gault,* 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 where the Court held:

> "Although our decision (in *Kent*) turned upon the language of the statute, we emphasize the necessity that 'the basic requirements of due process of fairness' be satisfied in such proceedings."

The Illinois Supreme Court in affirming the conviction of Joseph Bombacino and overruling his contention that he was entitled to a hearing prior to the juvenile court's waiving of its jurisdiction over him held:

> "Under our act a due process hearing as prescribed in *Kent* is not required at this stage of the proceeding." 280 N.E. 2d at 699.

The Illinois statute in question provides that on motion of the State a juvenile's criminal case may be transferred to the Circuit Court for prosecution as an adult unless the juvenile court Judge objects and if he does so object, the matter is then referred to the Chief Justice of the Court in which the case is pending for final disposition. The transfer of the juvenile's case and the attendant non-objection of the juvenile court Judge is not an appealable order. *People* v. *Jiles*, 43 Ill. 2d 145. The District Court held *Kent* and the U.S. Constitution requires a hearing be held and the reasons given before a juvenile defendant's delinquency petitions are dismissed and the Juvenile court waives its jurisdiction and protection over a juvenile and allows the State to try him as an adult.

This decision is in line with many States which have been confronted with the same question and three Circuit Courts of Appeals in the United States.

U.S. Courts of Appeal

Third Circuit, *U.S. ex rel. Turner* v. *Rundle*, 438 F. 2d 639 (3rd Cir. 1971)

Fourth Circuit, *Kemplen* v. *State of Maryland*, 428 F. 2d 169 (4th Cir. 1970)

Ninth Circuit, *Powell* v. *Hocker*, 453 F. 2d 653 (9th Cir. 1972)

District Courts

Brown v. *New Jersey*, 35 U.S.L.W. 2553 (D.N.J. 1967)

Miller v. *Quatsoe*, 348 F. Supp. 764 (E 1) (Wisc. 1972)

Broadway v. *Betto*, 338 F. Supp. 827 (Texas 1971)

State Courts

Florida. *Steinhauer* v. *State*, 206 So. 2d 25 (1968)

Hawaii. *In re Doe, 50 Hawaii* 620, 446 P. 2d 564 (1968) This case holds that an earlier opinion which held that a hearing is not required, is now suspect because of the ruling in *Kent* v. *United States*.

Indiana. *Summers* v. *State*, 202 Kansas 89, 447 P. 2d 158 (1968)

Kentucky. *Smith* v. *Commonwealth*, 412 S.W. 2d 256 (1967)

Maryland. *In re Cager*, 251 Md. 473, 248 A. 2d 384 (1968)

Missouri. *State ex rel. Arbeiter* v. *Reagan*, 427 S.W. 2d 371 (1968) *Jefferson* v. *State*, 442 S.W. 2d 6 (1969)

Nevada. *Kline* v. *State*, 464 Pa. 2d 460 (1970)

New Jersey. *In re State in Interest of H.C.*, 106 N.J. Super. 583, 256 A. 2d 322 (1969)

Ohio. *State* v. *Yoss*, 10 Ohio App. 2d 47, 225 N.E. 2d 275 (1967)

Pennsylvania. *Commonwealth ex rel. Freeman* v. *Superintendents*, 212 Pa. Super. 422, 242 A. 2d 903 (1968)

Rhode Island. *In re Korreia*, 243 A. 2d 759 (1968)

Washington. *State* v. *Piche*, 74 Wash. 2d 9, 442 P. 2d 632.

Wisconsin. *In re Winburn*, 32 Wisc. 2d 152, 145 N.W. 178 (1966)

Ironically, the Illinois Supreme Court prior to the decision in the instant case recognized that the due process clause of the U.S. Constitution applied to Juvenile Court proceedings for in the case of *In re Urbasek,* 38 Ill. 2d 533, the court held that the quantum of proof at a juvenile adjudicatory hearing was proof beyond a reasonable doubt. In fact, that decision was rendered prior to this Court's decision in the case of *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

This Court has recognized that procedural due process is essential whenever a right or privilege conferred by the government is withheld from a citizen. In *Goldberg* v. *Kelly,* 397 U.S. 254, 25 L. Ed 2d 287, 90 S. Ct. 1011 (1970) this court stated that:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievouse loss,' *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168, 95 L. Ed. 817, 852, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the Governmental interest in summary adjudication." 25 L. Ed. 2d at 296, 397 U.S. at 263.

It cannot be disputed that the juvenile does suffer a grievous loss and that he is faced with grave consequences when he is transferred from the Juvenile Court to the adult criminal court. These consequences include:

(a) The probability of severe punishment.

(b) The lack of confidentiality of the proceedings.

(c) A public arrest record.

(d) Possible loss of civil rights upon conviction.

(e) Disqualification for future public employment.

(f) The quite likely abuse of a youthful offender in a penitentiary of older and more hardened convicted felons.

(g) The likelihood of harsher penalty upon repetition under various recidivist statutes through the United States.

Whether the petitioner herein can avail himself of a juvenile proceeding as a matter of right, or whether the State of Illinois could abolish its entire juvenile court system by a single act of the legislature, is not germane to a decision as to whether due process requires a hearing under the Illinois Juvenile Court Act as it then existed. It has been established that even where a privilege is withheld from an individual, or is revoked after being conferred, due process requires that a hearing be granted prior to a denial or revocation. *Goldberg* v. *Kelly*, supra.

The State cannot seriously contend that the decision to prosecute a juvenile as an adult rests solely with the prosecutor especially in light of Chapter 37, Illinois Revised Statutes, Section 702-8(2) and (3). They read as follows:

> "No law enforcement officer or other person of agency may knowingly transmit to the Department of Public Safety or to the Federal Bureau of Investigation any fingerprint or photograph relating to a boy or girl
>
> *Section 702-8 (2):*
>
> who has been arrested or taken into custody before his seventeenth birthday or her eighteenth birthday, unless the court in proceedings under this Act authorizes the transmission or enters an order under section 702-7 *permitting* the institution of criminal proceedings." (Emphasis added.)
>
> *Section 702-8 (3):*

> "The records of law enforcement officers concerning all boys under 17 and all girls under 18 must be maintained separate from the records of arrest and may not be open to public inspection or their contents disclosed to the public except by order of the court or when the institution of criminal proceedings has been *permitted* under Section 702-7 . . ." (Emphasis added).

In *Wisconsin* v. *Constantineau*, 400 U.S. 433, 27 L. Ed. 515, 91 S. Ct. 507 (1971), after noting that it is procedure that marks much of the difference between rule by law and rule by fiat, the Court stated that:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the Government is doing to him, notice and opportunity to be heard are essential . . . only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." 400 U.S. at 437, 27 L Ed. 2d at 519.

This Court in *Stanley* v. *Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), held that due process requires a hearing before an unwed father loses custody of his child. Earlier the Supreme Court in *Bell* v. *Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971) held that due process requires a hearing before a driver's license could be revoked where there was no showing of fault on the part of the licensee.

In the instant case the juvenile court held no hearing to even establish probable cause that the petitioner was guilty of the offenses charged. Nor did the court inquire into the juvenile's past criminal background, if any (he had none), into his family life, his scholastic record, his IQ, the chances of the juvenile court being able to set up a rehabilitation program if the petitioner was proved

guilty of the offense. All these things are necessary for the court to make an intelligent and meaningful ruling as to whether to waive its jurisdiction over a juvenile.

In reversing the District Court and deciding there was no fundamental unfairness, the Seventh Circuit shifted the burden of proof to the petitioner for the purposes of the court's decision. The Seventh Circuit assumed that the transfer proceeding was of such a critical importance to the juvenile that any fundamental procedural unfairness in that proceeding will require a subsequent conviction to be set aside. The court then went on to state that they found no unfairness in the Juvenile Court record before them in that the court did not refuse to hear any evidence offered on behalf of the petitioner because no offer was made. The Court overlooked the fact that the moving party was the State's Attorney of Cook County, Illinois who was seeking to deprive the petitioner of any rights he may have had in the Juvenile Court system and therefore the burden does not rest upon the petitioner to present evidence as to why his case should not be transferred before the State has satisfied its burden that the case should be transferred. No evidence was taken or offered by the State to show the court why the protections of the Juvenile Court should not be afforded this petitioner.

The Seventh Circuit further misconstrued the purpose of the transfer hearing, that being whether there was sufficient evidence against the petitioner to even consider criminal prosecution. The court alluded that the fact that an indictment was returned and that evidence of probable cause must have been presented to secure that indictment and therefore there is no constitutional requirement that a probable cause showing has to be made twice.

The probable cause of which we speak at the Juvenile Court level was probable cause to believe he committed a crime in order to divest the Juvenile Court of its jurisdiction whereas the probable cause presented to the Grand Jury is to give jurisdiction to the Circuit Court in order to try a defendant for a felony. (The Illinois Constitution requires a Grand Jury indictment before someone may be tried for an offense punishable by imprisonment in the penitentiary. Article I, Section 7, Illinois Constitution, 1970).

In *Kent* v. *United States, Supra,* the court set down determinative factors which will be considered by a judge in deciding whether the Juvenile Court's jurisdiction over such offences will be waived. One of the criteria was:

> "The prosecutive merit of the complaint, i.e., whether there is evidence upon which the grand jury may be expected to return an indictment."

This Court therefore has recognized the distinctions between presenting evidence to the Juvenile Court Judge and presenting evidence to the Grand Jury—a distinction which obviously was lost upon the Seventh Circuit.

This Court has established fundamental fairness as the standard of due process in juvenile proceedings. *In re Gault, supra, In re Winship, supra, McKiever* v. *Pennsylvania,* 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971).

In *McKiever,* the court recognized the value of the juvenile court system and the loss which the juvenile suffers when deprived of the juvenile court's ability to function. In refusing to find a constitutional mandate that a jury trial was required in a juvenile proceedings, the Court held:

> "Meager as has been the hoped for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process." 403 U.S. at 537, 29 L. Ed. 2d 662.

The due process standard of fundamental fairness has always included opportunity to be heard at a meaningful time and in a meaningful manner. *Grannis* v. *Ordean*, 234 U.S. 385, 58 L. Ed. 1363, 34 S. Ct. 779 (1914), *Armstrong* v. *Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965); *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); *Wisconsin* v. *Constantineau, supra.*

In *Haziel* v. *U.S.*, 404 F. 2d 1275 (1968), the United States Court of Appeals for the District of Columbia recognized the waiver proceedings critical importance to the juvenile in terms of due process when it said:

> "The divide between the juvenile court with its promise of non-punitive rehabilitation and the harsher world of the district court is one not lightly to be crossed." 404 F. 2d at 1278.

The rationale of *McKiever* was that the right to a jury in a juvenile proceedings would not serve to preserve the juvenile system and would in fact equate it with a criminal proceeding. *McKiever* supports our contention that due process in juvenile proceedings requires a hearing before the decision to waive jurisdiction of the juvenile courts is made. Conducting such a hearing would strengthen the possibility of retaining the juvenile court's jurisdiction and therefore pursue the "idealistic prospect of an intimate, informal, protective proceeding." *McKiever, supra.* Consequently it would act as a buttress against the in-

clination to "tend once again to place the juvenile squarely in the routine of the criminal process". 403 U.S. at 547, 29 L. Ed. 2d at 662.

This Court should recognize the Supreme Court's ruling in *Shaughnessy* v. *U.S. ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 where the court stated that:

> "No society is free when the Government makes one person's liberty depend upon the arbitrary will of another."

Without a meaningful hearing, without the representation of counsel at such a hearing, without equitably developed and judicially scrutinized standards for waiver without stated reasons for the juvenile court's decision regarding the waiver which may be reviewed by the Appellate Courts, there can be no meaningful claim that the juvenile court system is designed to benefit the offender and society.

Kent required that the court have before it a statement of reasons motivating the waiver including some of the relevant facts. In this case there was no statement of reasons and we are at a loss to say why the court did not voice the objection which the statute allows him to do. In dismissing this contention the Seventh Circuit says that the *Kent* rule that a statement of reasons should be given is not inflexible and that the statement was less necessary in this case when the petitioner was represented by counsel. There was, however, nothing that counsel could have explained to the juvenile because nothing was said by the court. The court merely said that on motion of the State he was transferring the case to the Juvenile Court and dismissing the juvenile petitions. No layman nor lawyer could have, from that statement, understood the underlying reasons behind the court's decision. Fur-

ther the Seventh Circuit Court states that the purpose for reasons being stated was for a meaningful appellate review and that no appellate review lay from an order of transfer from an Illinois law. (*People* v. *Jiles*, 43 Ill. 2d 145, 251 N.E. 2d 529). However, *Kent* recognized that the proper method of reviewing the decision of the Juvenile Court was by way of motion to dismiss the subsequently returned indictment. This court held in *Kent:*

> "There is no question that the order is reviewable on motion to dismiss the indictment in the District Court . . ." *Kent* v. *U.S.*, 16 L. Ed. 2d 84, at 92.

The petitioner in this case moved to dismiss the indictment on the grounds that the Juvenile Court improperly waived its jurisdiction, which motion was denied by the trial court. The Seventh Circuit obviously confused the trial court review of the transfer order with the appellate review. The petitioner in this case was seeking the criminal court judge's review of the transfer order via a motion to dismiss the indictment as was the accepted practice enunciated in *Kent* v. *U.S., Supra.* The trial court had no way of reviewing the Juvenile Court Judge's action as no reasons were stated and counsel surely could not have advised his client or the trial court the reasons why the Juvenile Court acted as it did.

Contrary to the statement of the Seventh Circuit that "we find no essential unfairness in the record before us" the record is replete with unfairness. A 16 year old boy with no criminal record and a good family background and acceptable scholastic record is denied the benefits of the Juvenile Court system and all of the rights appurtenant thereto on the motion of the State's Attorney of the County while a Juvenile Court judge who has the statu-

tory right to object to said motion, sat by and acted as a rubber stamp for the prosecution. Fundamental fairness requires more than the obsequious actions of a judge when so many fundamental rights to a young man are at stake. As there has been a great deal of unfairness we pray that this petition be granted.

CONCLUSION

WHEREFORE, for the foregoing reasons the Petitioner respectfully requests that the petition be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 — JANUARY SESSION, 1974

No. 73-1175
UNITED STATES OF AMERICA ex rel. JOSEPH BOMBACINO,

Petitioner-Appellee,

v.

PETER BENSINGER,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 C 2937
JULIUS J. HOFFMAN, *Judge.*

Argued January 9, 1974 — Decided June 19, 1974

Before CUMMINGS and STEVENS, *Circuit Judges,* and GRANT,* *Senior District Judge.*

STEVENS, *Circuit Judge.* The district court concluded that there was a constitutional defect in the statutory

*Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

procedure by which Illinois determined to prosecute petitioner as an adult rather than as a juvenile; accordingly, the court issued a writ of habeas corpus ordering him released from custody. Since we find no constitutional infirmity in the Illinois procedure as it was applied in Petitioner's case, we reverse.

In 1967 petitioner, who was then 16, was arrested in connection with the beating of another youth. A delinquency petition filed in the juvenile court charged him and two other boys with aggravated battery. After the victim died, the State's Attorney of Cook County moved, pursuant to a statutory provision which has since been amended,[1] to transfer the case to the Criminal Division

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1. The statutory procedure which governed petitioner's transfer provided:

> If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the State's Attorney shall determine the court in which that minor is to be prosecuted; however, if the Juvenile Court Judge objects to the removal of a case from the jurisdiction of the Juvenile Court, the matter shall be referred to the chief judge of the circuit for decision and disposition. If criminal proceedings are instituted, the petition shall be dismissed insofar as the act or acts involved in the criminal proceedings are concerned. Taking of evidence in an adjudicatory hearing in any such case is a bar to criminal proceedings based upon the conduct alleged in the petition.

Ill. Rev. Stat., Ch. 37, § 702-7(3) (1967). Effective July 31, 1967, the statute was amended to provide:

> If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, and, on motion of

of the Circuit Court of Cook County. Petitioner's counsel objected to the transfer. After hearing oral argument, but without receiving any evidence, the juvenile court granted the prosecutor's motion. The three boys were then indicted for murder. Two were acquitted; the jury found petitioner guilty of voluntary manslaughter. He received a sentence of one to five years in the custody of the Department of Corrections. On appeal, the Illinois Supreme Court affirmed, expressly holding that the transfer procedure was not in conflict with *Kent* v. *United States*, 383 U.S. 541.[2]

In *Kent*, the Supreme Court held that the juvenile court of the District of Columbia could not waive jurisdiction over a minor charged with a criminal offense without first affording the minor a hearing. Kent had been afforded no hearing; the juvenile judge's *ex parte* decision was inadequate because his counsel was denied access to records considered by the judge, because the judge had an immediate opportunity to consider the issue in an unhurried and impartial manner, and because no statement of reasons supported the decision of the juvenile court.[3] The Supreme Court's holding in *Kent*

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the State's Attorney, a Juvenile Judge, designated by the Chief Judge of the Circuit to hear and determine such motions, after investigations and hearing but before commencement of the adjudicatory hearing, finds that it is not in the best interests of the minor or of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.

Ill. Rev. Stat., Ch. 37, § 702-7(3) (1972:

2. See *People* v. *Bombocino*, 51 Ill. 2d 17, 280 N.E. 2d 697 (1972) *cert. denied*, 409 U.S. 912.

3. 383 U.S. at 546, 554.

rested explicitly on the language of the District of Columbia statute.[4] At several points in the *Kent* opinion,[5] as well as in *In re Gault*, 387 U.S. 1, however, the Court indicated that such proceedings must comport with the basic requirements of the Due Process Clause.[6]

There is some uncertainty about the impact of the Due Process Clause on the procedure followed by a state in determining whether to transfer a youth from the jurisdiction of a juvenile court to that of a court of ordinary jurisdiction. There is respectable authority for the view that the determination may be committed entirely to the discretion of the prosecutor.[7] Under this view, procedural

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4. See 383 U.S. at 556.

5. See 383 U.S. at 553, 554, 555 and 556.

6. "Although our decision [in *Kent*] turned upon the language of the statute, we emphasized the necessity that 'the basic requirements of due process and fairness' be satisfied in such proceedings [383 U.S. at 553]." 387 U.S. at 12.

7. The Court of Appeals for the Fourth Circuit, sitting *en banc*, concluded that confining the decision to transfer totally to the prosecutor's discretion did not violate the Due Process Clause. *Cox* v. *United States*, 473 F. 2d 334 (1973). In *People* v. *Jiles*, 43 Ill. 2d 145, 251 N.E. 2d 529, 531 (1969), Justice Schaefer expressed the same view: "While there would probably be almost universal agreement that it is desirable for a State to maintain a juvenile court and to establish special facilities for the treatment of a saparate category of 'juvenile delinquents', we are aware of nothing in the Constitution of the United States . . . that requires a State to do so. Similarly, while it may be highly desirable to commit to the judge of a specialized juvenile court the determination of whether or not a particular juvenile is to be prosecuted criminally, we are

safeguards would not be constitutionally required unless the state elected to provide for judicial participation in the transfer decision. Since the Illinois procedure under review in this case did provide that the juvenile judge could object to a decision by the State's Attorney to transfer,[8] for purposes of our decision we may assume that the transfer proceeding is of such critical importance to the juvenile[9] that any fundamental procedural unfairness in that proceeding will require a subsequent conviction to be set aside.[10]

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aware of no constitutional requirement that a State must do so." Although these authorities appear to support the proposition that transferring a juvenile offender from the jurisdiction of the juvenile court to that of the adult court may be committed to prosecutorial discretion without regard to the seriousness of the offense charged, neither those courts, nor we, have had to consider whether a relatively minor offense might raise a different issue.

8. The statute set forth in n. 1, *supra*, has been construed by the Illinois courts to provide for the exercise of prosecutorial discretion, controlled by the power of the juvenile judge to object to transfer. *People* v. *Jiles*, *supra* n. 7, 251 N.E. 2d at 531; *People* v. *Bombacino*, *supra* n. 2, 280 N.E. 2d at 699. In *Bombacino*, *Kent* was distinguished on the ground that the discretion under the District of Columbia statute there involved was vested in the juvenile court, not the prosecutor.

9. "Juvenile status is, in effect, a basis upon which a youthful offender can plead diminished responsibility for his unlawful act. If he can show that juvenile jurisdiction should not be waived by the court, he is not subject to the usual adult penal sanctions." *Kemplen* v. *State of Maryland*, 428 F.2d 169, 175 (4th Cir. 1970). See also *Powell* v. *Hocker*, 453 F. 2d 652, 654 (9th Cir. 1971).

10. *Cf. Kirby* v. *Illinois*, 406 U.S. 682.

We find no such unfairness in the record before us. Petitioner made only two objections to the proceedings which resulted in his transfer: first, that no evidence was heard; and, second, that the judge gave no statement of reasons for his decision.

There are two aspects to the argument based on the absence of an evidentiary hearing. It is first significant that the court did not refuse to hear any evidence offered on behalf of the petitioner because no such offer was made. In oral argument his counsel made certain representations which, since they were unchallenged, presumably were accepted as true by the judge. Although petitioner's guilt or innocence was in dispute, the facts concerning the juvenile's age, education, family background, and the absence of a prior record, appear to have been undisputed. We find nothing in the record to indicate that petitioner was denied the opportunity to adduce evidence relating to the transfer issue.

At the oral argument before the juvenile judge, petitioner argued that the prosecutor should be required to introduce evidence to show probable cause that the juvenile was guilty of a criminal offense. Quite clearly, under the Illinois statutory procedure, such evidence was unnecessary.[11] We find nothing in either the *Kent* opinion

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11. Indeed, had evidence of that character been presented, it might have had the effect of commencing an adjudicatory proceeding, thus barring subsequent criminal prosecution. See the statute applicable to petitioner's case, *supra* n. 1. The new statute, also quoted in n. 1, *supra*, contains the same requirement. *Cf. People* v. *DePoy*, 40 Ill. 2d 433, 240 N.E. 2d 616 (1968), in which the court held that a hearing in which evidence was taken to determine whether a juvenile should be held in custody pursuant to

or in the concept of fundamental fairness which mandates such a hearing before the jurisdiction of the juvenile court may be waived.'[12] Of course, before an indictment can be returned, evidence of probable cause, sufficient to satisfy the grand jury, must be presented. That procedure adequately protects a person's rights; there is no constitutional requirement that a probable cause showing must be made twice.

We are also satisfied that there is no inflexible requirement that a statement of reasons always be given by a juvenile judge before allowing a transfer to occur. The need for a statement of reasons in any procedural context must be evaluated in the light of the function such a statement would perform. We have recognized the importance of providing uncounselled laymen with a written explanation of decisions denying parole,[13] or denying a

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Ill. Rev. Stats. Ch. 37, § 703-5(2) did not constitute an "adjudicatory hearing" for purposes of § 702-7(3). See also *Jones* v. *Breed*, —— F. 2d —— (9th Cir. Slip. Op. No. 72-2644, May 15, 1974).

12. Due process is, of course, a flexible concept; the procedural safeguards which are required differ in different circumstances. See, *e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 480; *Gagnon* v. *Scarpelli*, 411 U.S. 778, 790.

13. In *King* v. *United States*, 492 F. 2d 1337, 1340-1341 n. 11 (7th Cir. 1974), we quoted a report on "Federal Parole Procedures," 25 Ad. L. Rev. 459, 484-485 (Fall, 1973), to the following effect:

> "Giving reasons for denying parole is desirable for both rehabilitational and legal reasons. A prisoner may feel less resentful of a negative decision if he knows the reasons for it, and in planning his activities in the institution he ought to understand clearly

Selective Service reclassification,[14] and are aware of the desirability of such explanations in a prison disciplinary context.[15] In such situations the statement enables the lay-

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what will help him to obtain an early parole. When the nature of his crime is such that early parole is not likely in any event, he should be protected from unrealistic hopes that can only lead to disappointment and bitterness. All this is the job of a prison counselor in any case, but the Parole Board can make that job much easier by formally stating its reasons.

"From the legal standpoint, requiring a statement of reasons makes it possible to check abuse or error. There is no way to discover if the Board is denying parole for an unconstitutional or improper reason if the Board never gives reasons for its decisions. It is not to impugn the good faith or competence of the Board to suggest the possiblity that in some cases it might rely on reasons for denying parole that the court would feel were improper or unconstitutional if they knew of them."

14. Without a statement of the reasons why a Selective Service Board rejected a facially sufficient request for conscientious objector status, "the court can not otherwise determine with any degree of assurance that the decision really made by the board properly supported the rejection and had a basis in fact. . . ." *United States* v. *Lemmens*, 430 F. 2d 619, 624 (7th Cir. 1970).

15. Although the opinion in *Miller* v. *Twomey*, 479 F. 2d 701 (7th Cir. 1973) did not specify a written statement of reasons as one of the bare minima that must accompany the substantial deprivation of the "liberty" retained by a prison inmate, this element of procedural fairness was among those which the district courts were directed to evaluate on remand during the proceedings relating to remedy. 479 F. 2d at 716-719.

man both to obtain meaningful appellate review and to know the standards of the decision maker to which he must attempt to conform his conduct. But no appellate review lay from an order of transfer under Illinois law applicable to petitioner's case,[16] and the decision included no prescription for future conduct. Moreover, a statement of reasons is less necessary when the person affected is represented, as was petitioner in this case, by competent counsel.

We are well aware of the significant value of a statement of reasons in the decisional process of any case because such a statement always reduces the risk that the decision may be, or may appear to be, arbitrary. Nevertheless, there are so many aspects of the judicial process in which critical decisions have traditionally been made without explanation, that we could not properly hold that a statement is constitutionally mandated simply as a safeguard against real or apparent arbitrariness. Unlike *Kent*, in which the decision to transfer was for the juvenile judge and the Supreme Court apparently had some doubt as to whether he had had the opportunity to consider it sufficiently,[17] the present case involves a statutory scheme in which the role of the judge was confined to supervising the exercise of prosecutorial discretion and the undisputed fact that the judge was given, by the oral argument he heard, sufficient opportunity to consider whether objection was appropriate. In this case the absence of a statement of reasons cannot be termed fundmentally unfair.

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16. See *People* v. *Jiles, supra* n. 7.

17. See the Court's footnote 5, in *Kent*, 383 U.S. at 546; and 383 U.S. at 555-556.

Since we find no essential unfairness in the record before us, the judgment of the district court must be

REVERSED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 12, 1974

Before

Hon. JOHN PAUL STEVENS, Circuit Judge

UNITED STATES OF AMERICA, ex rel. JOSEPH BOMBACINO,

Petitioner-Appellee

vs.

No. 73-1175

PETER BENSINGER,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (72 C 2937)

This matter comes before the Court on the "Motion To Stay The Mandate", filed herein on July 1, 1974 by counsel for Petitioner-Appellee; and the "Response To Motion to Stay Mandate—Motion To Revoke Bond", filed herein on July 3, 1974 by counsel for Respondent-Appellant. Upon consideration of the foregoing,

IT IS ORDERED that Petitioner-Appellee's motion for stay of mandate be, and the same is hereby, DENIED.

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IN THE

Supreme Court of the United States

No. 73-2051

UNITED STATES OF AMERICA ex rel. JOSEPH BOMBACINO,

Petitioner,

vs.

PETER BENSINGER,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 498 F. 2d 875 (1974).

JURISDICTION

Jurisdiction in this Court has been adequately alleged.

QUESTION PRESENTED

Whether it is constitutionally permissible to confer upon a prosecutor the discretion to try a sixteen year old juvenile as an adult, subject to the Juvenile Court Judge's objection, where that Juvenile is alleged to have committed a crime according to the laws of the state.

STATEMENT OF THE CASE

The facts of the case are adequately set forth in the Petition.

REASONS FOR DENYING THE WRIT

The Illinois statute which was challenged below and which controlled the procedure used in the Circuit Court is § 702-7 (3) of the Illinois Juvenile Court Act [Ill. Rev. Stat., 1967, Ch. 37, § 702-7(3)]. That section provides:

> (3) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the State's Attorney shall determine the court in which that minor is to be prosecuted; however, if the Juvenile Court Judge objects to the removal of a case from the jurisdiction of the Juvenile Court, the matter shall be referred to the chief judge of the circuit for decision and disposi-

> tion. If criminal proceedings are instituted, the petition shall be dismissed insofar as the act or acts involved in the criminal proceedings are concerned. Taking of evidence in an adjudicatory hearing in any such case is a bar to criminal proceedings based upon the conduct alleged in the petition.[1]

Initially, it should be noted that this statute specifically gives the State's Attorney the responsibility of determining whether a defendant shall be proceeded against in the juvenile court or in the adult court, subject only to an objection by the Juvenile Court Judge. Further, the section provides that if criminal proceedings are begun against the offender, any previously filed juvenile court petition *shall* be dismissed. Even a cursory reading of the statute reveals that the Illinois legislature intended to give the State's Attorney, not the court, the responsibility of making this decision.

The Illinois Supreme Court has held in *People* v. *Handley*, 51 Ill. 2d 229, 283 N.E. 2d 205 (1972), that the statute "does not vest jurisdiction in the court to determine the matter of waiver of jurisdiction." And in petitioner's direct appeal from his conviction, the Illinois Supreme Court said:

> . . . [T]he State's Attorney in Illinois is vested with the discretion to determine whether or not to proceed criminally against a juvenile offender, subject only to the right of the judge presiding in the juvenile division to object, in which event the matter is referred

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1. On January 1, 1973, three years after the facts in this case, the new Unified Code of Corrections became effective in Illinois, and that Act substantially changed this procedure. Section 702-7(3) of the Code requires a judicial investigation and a hearing.

> to the chief judge of the circuit court for his decision. (Ill. Rev. Stat. 1967, ch. 37, par. 702-7(3).) Thus under the procedure established by the Illinois Juvenile Court Act the role of the judge is greatly diminished. (*People* v. *Jiles*, 43 Ill. 2d 145.) Under our act a due process hearing as prescribed in *Kent* is not required at this stage of the proceeding. *People* v. *Bombacino*, 51 Ill. 2d at 20.

And since this court is bound by the construction given the statute by the Illinois Supreme Court, *U. S.* v. *Thirty Seven (37) Photographs*, 91 S. Ct. 1400 (1971); *Garner* v. *State of Louisiana*, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961), this decision must be premised upon the fact that in Illinois the procedure at bar is prosecutorial, as opposed to judicial, in nature. Any attempt to impose a judicial character or judicial procedures upon that decision would be totally inconsistent with the well-established and long standing rule cited above—that federal courts defer to the decisions of state tribunals when the construction of a state statute is at issue.

The proceedings in the Circuit Court of Cook County were in literal compliance with the Juvenile Court Act and its construction by the Illinois Supreme Court. A delinquency petition was initially filed, but when the State's Attorney subsequently determined that petitioner should be tried as an adult, he began adult proceedings and requested a dismissal of the juvenile petition. The court recognized the statutory prerogative of the prosecutor, cited the statute at issue and ordered:

> "Criminal proceedings instituted, juvenile petitions will be dismissed and their cases will be closed as to the Juvenile Court." (R. 40.)

The petitioner cites *Kent* v. *United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966) as establishing the proposition that a juvenile defendant must be accorded fairness and due process by a juvenile court waiving its jurisdiction over the minor charged with a criminal offense. We strongly urge that the case does not control the interpretation of the Illinois statute in question. In *Kent*, the Court considered the Juvenile Court Act for the District of Columbia.[2] The statute articulated that the waiver decision was a judicial function. A hearing would be required to satisfy the need for a "full investigation" prior to granting waiver. But under the Illinois statute, the decision as to whether the petitioner would be tried in juvenile or adult court was a matter in the discretion of the prosecutor, not the court.

The most significant opinion dealing with this precise issue is *Cox* v. *United States*, 473 F. 2d 334 (4th Cir. 1973). The case involved a seventeen year old juvenile who participated in a bank robbery. The court held that prosecutorial discretion in the matter of court selection precluded a due process attack stating:

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2. If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases. D.C. Code Sec. 11-914 (1961) now sec. 11-1553 (Supp. IV, 1965)

"In the federal system there are no separate juverile courts. The district courts have jurisdiction to try juveniles, youths who have not yet attained their eighteenth birthdays. Under 18 U. S. C. A. § 5032, a juvenile charged with a federal offense not punishable by death or life imprisonment shall be prosecuted as a juvenile delinquent, if he consents to that procedure and unless the Attorney General has expressly directed that he be prosecuted as an adult. We do not have the problem of judicial waiver of the primary jurisdiction of a juvenile court to the jurisdiction of a general trial court. What is involved is a decision by the Attorney General to charge a juvenile with juvenile delinquency based upon his alleged violation of the law and to proceed against him as a juvenile, or to charge him as an adult with the substantive transgression of the law. As Judge Bryan points out, this is a prosecutorial decision beyond the reach of the due process rights of counsel and a hearing. *Cox, supra*, p. 334.

Many of the protections of the Bill of Rights extend far beyond the courtroom, of course, but the guaranty of a hearing found in the due process clause of the Fifth Amendment has traditionally been limited to judicial and quasi-judicial proceedings. It has never been held applicable to the processes of prosecutorial decision-making. The only proper question here, therefore, is whether the general statutory scheme is constitutional, whether Congress reasonably might vest in the Attorney General, rather than in a judge in a judicial proceeding, the responsibility of deciding whether or not to prosecute a juvenile as an adult. That question is appropriately answered affirmatively." *Cox, supra*, p. 336.

In another recent case, *U.S.* v. *Alexander*, 333 F. Supp. 1213 (D. D. C. 1971), the same distinction as in *Cox* v. *U.S.* was recognized. The court noted that the applicable

statute, the District of Columbia Court Reform and Criminal Procedure Act of 1970, gave the courts no jurisdiction to determine where a juvenile offender was to be tried, but gave the U.S. Attorney total discretion in making that decision. The Court thus distinguished *Kent* v. *U.S.* and held that under such a statute, the requirements of constitutional due process do not apply. In doing so, the court said:

> "Movants have sought to create the impression that the Act gives the United States Attorney a new and far-reaching discretion which enables him to ignore the traditional waiver proceeding. This is not the case. Unlike the situation in Kent, no right to waiver of jurisdiction is involved here. Jurisdiction for this class of offenders is placed by informed legislative action solely in the adult courts. The wide discretion vested in the prosecutor to bring charges or not to bring charges, to defer to a state or to select a federal forum, to reduce charges to lesser offenses, etc. is universally recognized. Nothing more is involved here. Powell v. Katzenbach, 123 U.S. App. D. C. 250, 359 F. 2d 234 (1965), cert. denied, 384 U.S. 906, 86 S. Ct. 1341, 16 L. Ed. 2d 359 (1966), reh. denied, 384 U.S. 967, 86 S. Ct. 1584, 16 L. Ed. 2d 679 (1966); Newman v. United States, 127 U.S. App. D. C. 263, 382 F. 2d 479 (1969); Hutcherson v. United States, 120 U.S. App. D. C. 274, 345 F. 2d 964, cert. denied, 382 U.S. 894, 86 S. Ct. 188, 15 L. Ed. 2d 151 (1965). Indeed this Circuit recently reinforced the absolute nature of the prosecutor's discretion even in circumstances that had led the trial judge to believe a clear abuse of that discretion was involved. United States v. Gainey, 142 U.S. App. D. C. 262, 440 F. 2d 290 (1971)." 333 F. Supp. at 1216-1217.

It is essential that prosecutorial discretion not be infringed upon in these areas because it is an executive func-

tion rather than a judicial one. In *United States* v. *Cox*, 342 F. 2d 167 (5th Cir. 1965), a district court adjudged a U.S. Attorney guilty of civil contempt for failure to obey an order of the court which directed him to sign an indictment returned by a federal grand jury. That order was reversed upon appeal, and the court stated:

> Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

It is well settled that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 386 U.S. 448, 456, 82 S. Ct. 501, 506, 7 L. Ed. 2d 446. The Court should recognize that a decision invalidating the statute in question would serve to undermine the concept of prosecutorial discretion in its many facets. The recognition of this authority has been upheld in numerous cases. See: *Rosenberg* v. *U.S.*, 346 U.S. 273, 294-95 (1953); *U.S.* v. *Baumgarten*, 300 F. 2d 807, 808 (2nd Cir. 1962); *Siravo* v. *U.S.*, 377 F. 2d 469, 473 (1st Cir. 1967); *United States* v. *Eisenmann*, 396 F. 2d 565, 567-68 (3nd Cir. 1968); *Black* v. *U.S.*, 405 F. 2d 187 (5th Cir. 1968); *U.S.* v. *Escobar*, 410 F. 2d 749 (5th Cir. 1969); *Elrich* v. *U.S.*, 283 F. 2d 481 (5th Cir. 1957); *Boggs* v. *Raines*, 273 F. 2d 636 (10th Cir. 1959). If prosecutorial discretion is limited in this way, this vital

tool will lose its effectiveness. This would only serve to seriously jeopardize the administration of our system of criminal justice which depends on its use.

If the Court grants that this question is controlled by the exercise of prosecutorial discretion under the statute, there is no need to address ourselves to the area of procedural due process. Notwithstanding the analysis outlined above, there is no basis to validate petitioner's claim because he has been unable to establish that the removal of the case to the adult court resulted in a "grievous loss" or was attended with unfairness.

This Court has stated that a prerequisite to the application of constitutional due process requirements is that the function at issue must visit a "grievous loss" upon the one affected, *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Thus, the first step in any procedural due process case is to determine whether the extent of the loss imposed is sufficiently serious to raise a constitutional issue. That loss can only be assessed by comparing that to which the accused has a right prior to state action with that to which he has a right after such action. Application of that process to the case at bar reveals that no such loss was imposed.

Prior to any decision by the prosecutor in this case, the petitioner faced the problem of accountability for his act under the criminal statues. Under the Juvenile Court Act he had no right nor even a justifiable expectation of being prosecuted as either a juvenile or as an adult. The statute creates no presumption in either direction and therefore no right vests.

The institution of proceedings in the juvenile court still created no presumption in either direction nor vested a

found wanting by the U.S. Supreme Court in In re: *Gault, supra* at 1442:

> "This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records and even as to those the evidence is that many courts routinely furnish information to the FBI and the military and on request to government agencies and even to private employers. Of more importance are police records. In most states the police keep a complete file of juvenile "police contacts" and have complete discretion as to disclosure of juvenile records. Police departments receive requests for information from the FBI and other law enforcement agencies, the armed forces and social service agencies and most of them generally comply. Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies."

An additional factor alleged by the petitioner is less severe punishment. But the Court in *In Re Gault, supra,* p. 1444 recognized that it is possible for a juvenile offender to be confined until he reaches his majority which in many instances may amount to a significantly more severe punishment. In that case a maximum two month and $50 fine penalty could have been turned into six years of confinement for the fifteen year old offender.

These problems are recognized by Chapter 37, Ill. Rev. Stat., Sec. 702-7 (5) which permits the juvenile on advice of counsel prior to an adjudicatory hearing to waive juvenile proceedings and elect to have his case heard in criminal court.

right in the accused, since the state's attorney could require that the juvenile proceedings be dropped by the simple expedient of filing criminal proceedings in the Circuit Court. In effect, a waiver of jurisdiction under the Illinois statute is a misnomer because the prosecutor has been given the power to effectively oust the juvenile court jurisdiction.

The State's Attorney exercised his discretion by prosecuting in the Circuit Court rather than in Juvenile Court. At this point petitioner's expectations were exactly the same as on the day of his arrest—to be held accountable under the criminal law for his act. No right to be prosecuted in any particular court vested. Consequently, the decision of the prosecutor visited no loss upon the petitioner. His expectations remained exactly the same after the decision as they had been preceding it.

In making the determination of whether the petitioner suffered a "grievous loss" in being transferred from Juvenile Court to the adult criminal court, it should be noted that there are certain advantages to being tried as an adult rather than as a juvenile. For example, the United States Supreme Court held in *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971), that in juvenile court a trial by jury is not mandated by the due process clause. The Court pointed out that it had not determined that all constitutional rights assured the adult accused of a crime are afforded to the juvenile in a delinquency proceeding. *McKeiver, supra,* at p. 532.

Petitioner claims that the degree of secrecy afforded juvenile court proceedings help to measure the loss he will suffer. But this concept was thoroughly discussed and

Moreover, in recent years the two proceedings are tending to become more and more similar. This Court has found that a confession of a juvenile improperly had is inadmissible, *Gallegos* v. *State of Colorado*, 370 U.S. 49, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962); *Haley* v. *State of Ohio*, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948). Adequate notice, right to counsel and the application of the essentials of due process to the delinquency hearing were recognized in *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), established the rule that a conviction in a juvenile proceeding must be based on proof beyond a reasonable doubt of every fact necessary to constitute the crime.

The Juvenile Court Judge has the power under the statute to raise an objection to the transfer of the juvenile to the adult court. If the Juvenile Judge objected to the removal of the case from the jurisdiction of the Juvenile Court, the matter would have been referred to the Chief Judge of the Circuit. When the state's attorney moved to transfer the case to the Criminal Division of the Circuit Court of Cook County, the petitioner had an opportunity to demonstrate to the Juvenile Court Judge that grounds existed for him to exercise his objection. As the opinion of the U.S. Court of Appeals for the Seventh Circuit indicated, petitioner had the right to present evidence at that time in opposition to the State's motion. *United States ex rel. Bombacino* v. *Bensinger*, 498 F. 2d 875, 877-78 (7th Cir. 1974). Since the petitioner had an opportunity to present his arguments to the Juvenile Court Judge in an attempt to convince him to exercise his objection, we must agree with the Court of Appeals that no unfairness was accorded to him. *U.S. ex rel. Bombacino. supra*, p. 877.

This Court has previously denied a Petition for Certiorari to the Illinois Supreme Court in which the petition propounded the same analysis as is presently before the Court, see *People* v. *Bombacino*, 409 U.S. 912, 93 S. Ct. 230, 34 L.Ed. 2d 173 (1972).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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